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Autonomy, education and the rights of children with special and additional support needs and disabilities in England and Scotland: A new paradigm?

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Abstract

Legislation enacted in 2014 in England and 2016 in Scotland attempts to boost the rights of children and young people with special and additional support needs in the context of education, particularly with regard to opportunities for their participation in decision-making and local planning, with governments in both nations claiming that the new measures place the UK at the forefront internationally on this issue. There are, however, key differences in the respective nations' legislation and policy, as well as similarities, which the article explores. Using case studies, it then examines the central issues arising in each jurisdiction in the practical realisation of the relevant rights. The article concludes with a comparative discussion of the recognition of children's autonomy in the context of education in the two nations, highlighting gaps between rhetoric and reality. [**Word count: 133**]

Keywords

Special educational needs**;** Additional support needs; Rights

Introduction

Children and young people with special education needs and disabilities (SEND) in England or additional support needs (ASN) in Scotland have, under separate legislation in each jurisdiction (primarily, the Children and Families Act (CFA) 2014 and the Education (Scotland) Act 2016 respectively), acquired significantly increased rights to be involved in decisions made by local authorities about their education. The legislation has also reinforced a general principle that children and young people's views should inform planning to meet their needs, as can be considered required by the UN Convention on the Rights of the Child (CRC), Article 12, and the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 7. The right to participate in educational decision-making is to be enjoyed on an equal basis with others regardless of disability (see Harris and Davidge 2019). Article 24 of the CRPD has also been influential, calling for 'an inclusive education system at all levels' directed to ‘enabling persons with disabilities to participate in a free society.’[1] General Comment No. 4 on the right to inclusive education calls for students with disabilities to ‘feel valued, respected, included and listened to’,[2] given support and assistance with communication, and given legislative guarantees of being heard and having their views given due consideration (UN Committee on the Rights of Persons with Disabilities 2016, paras. 12(e) and 63(l)). There is some concern, however, that the normative shift, resulting from the CRPD, in states’ policies towards inclusive education, while advancing the rights of disabled children in general, risks a denial of the voice of those benefiting from education in specialist segregated settings. More generally, there is a concern that mainstream provision may not be compliant with the emphasis on human dignity that is required in order to advance the notion of equality in human rights terms.

Claims have been made in both nations that the new domestic legislation places the UK at the forefront internationally with regard to the practical realisation of children and young people’s right to be involved in major decisions on educational provision and in relevant redress processes. In examining the practical reality we draw on an ESRC funded study titled *Autonomy, Rights and Children with Special Needs: A New Paradigm?* (Ref. ES/POO2641/1) which we undertook from 2017–2019. Our over-arching research question was the following: in the context of the education rights of children with SEN/ASN, to what extent are we witnessing a new paradigm in the recognition of autonomy?

Debates around autonomy, competence and capacity have particular resonance in the field of medical ethics because of their implications for matters of life and death. But these issues are also highly relevant to other fields of social decision-making, including family law (Tisdall 2018), youth justice (Hollingsworth 2013) and education. Since education is the

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[1] Article 24.1(c).

[2] UN Committee on the Rights of Persons with Disabilities (2016), para. 12(e).

principal universal service experienced by children, what happens in this domain is of particular significance to wider debates about children's autonomy and rights. Daly (2018, pp. 9 and 12), focussing on children's autonomy, argues that autonomy 'is primarily about being recognised as having choices to the extent you possibly can, free from undue influence of others, particularly from physical or legal coercion'; one can see therefore that it has a particular relevance to SEND, given the important decisions that fall to be made and where there is established professional support for the principle of engagement with the child's views. But Daly (2018, pp, 10, 13 and 14) argues that a concept of autonomy must acknowledge that protection needs may compromise autonomy interests in some situations, although children's wishes should only be 'overridden by the state only when truly necessary' and that support to enable their views to be formed and expressed should be provided. A fundamental question concerns the extent to which opportunities for inclusive participation by children and young people with SEND are effective and in line with the evolving capacities of those concerned, as envisaged by the CRC and CRPD, as well as the kind of participation that should occur and how it should be facilitated (see Lundy 2007, Callus and Farugia 2016, Daly 2018). Our research has enabled us to understand how the various rights are being implemented and the barriers affecting their realisation, with potential lessons for other policy areas where children's autonomy and rights are at issue and where equality and inclusion (in this case linked to disability factors) are of critical importance.

We begin with a cross-border comparison exploring key similarities and differences between the respective jurisdictions' legislation and policy frameworks. Then, using case studies of children and young people (young people are defined under the relevant domestic legislation as (in England) those aged 16 or over but under 25 or (in Scotland) aged 16 plus but still at school),[3] we examine the central issues which arise in the practical realisation of the rights in question. We conclude with a discussion of the extent to which the rights in the two nations have been significantly enhanced in reality. We argue that the rhetoric of autonomous rights and the avowed intention to place children and young people's views 'at the heart of decision making' (see UN Committee on the Rights of the Child 2014, para. 155) run up against major practical barriers on the ground, exacerbated by competing resource and policy objectives and in Scotland by rejection of formal education planning mechanisms.

Policy Background and Legislative Frameworks of Rights

The multifarious reforms to education policy and legislation over the past four decades (see Harris 2020) have been marked by, among other things, an increasing focus on parents' rights. By contrast, there has been little recognition of children's independent rights and autonomy. For example, since the early 1980s in both nations parents have had the right to express a preference over choice of school, and the Parents' Charters of the early 1990s underlined parents' rights to information on school and individual pupil performance, which have continued, as well as access to strengthened redress mechanisms. In relation to SEND and ASN, following the Warnock Report of 1978 (DES 1978) and the Education Act 1981, the policy emphasis was on partnership with parents. However, in relation to children, policy and legislation were infused with a discourse centred on the needs of the individual rather than on his or her rights per se (Tisdall and Riddell 2006).

The Education Act 1993 significantly enhanced *parental* rights, for example by allowing parents in England (and Wales) to express a school placement preference in a support plan (then known as a 'statement') and ensuring a more robust and independent

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[3] Children and Families Act 2014 s.83(2), Additional Support for Learning (Scotland) Act 2004 (as amended) s.29(1).

appellate process in the form of the Special Educational Needs Tribunal (see Harris 1997). Subsequently, following the Special Educational Needs and Disability Act 2001, an obligation was placed on local authorities to fund independent mediation and the tribunal's jurisdiction (which was subsequently transferred to the First-tier Tribunal, in 2008) was extended to include complaints relating to disability discrimination (Harris and Riddell 2011).

In Scotland, similar changes were initiated a decade later than in England, with the Education (Additional Support for Learning) (Scotland) Act 2004. Among other things it made provision for children and young people with long-term ASN arising from 'complex' or 'multiple' factors who have a need for additional support to have a co-ordinated support plan (CSP) and for the introduction of an Additional Support Needs Tribunal for Scotland (now the First-tier Tribunal). The new rights agenda was generally supported by parents and voluntary organisations but questioned by local authorities (Riddell and Weedon 2010). The growing emphasis on parents' rights was not extended at a policy level to the rights of children (Riddell *et al.* 2010, Harris and Riddell 2011).

This seemed to have changed with the latest legislative developments, the 2014 Act in England and the 2016 Act in Scotland, although they are far from exclusively concerned with a new rights agenda for children. In England, reform was heavily influenced by the Lamb (2009) report's conclusion that the SEND system had become a battleground between parents and local authorities, while the needs of children with SEND were not being tackled in a joined-up way by the relevant services (see DfE 2011 and 2012). Recent evidence indicates that concerns about SEND provision persist due to local authority difficulties in funding provision in an adverse budgetary environment (see House of Commons Education Committee 2019). The reforms have included the replacement of statements of need with education, health and care plans (EHCPs), thus covering not only education but also health and care needs. With a view to making dispute resolution less adversarial, mediation now must at least be considered by a would-be appellant before bringing an appeal. Particularly significant is the transference to young people of the parents' rights, giving young people full autonomy over SEND decisions (subject to a test of capacity – see below). Children are given fewer rights, but there is now a general statutory duty on local authorities (under s. 19 of the CFA) to ensure that they have regard to children and young people's views, wishes and feelings and to the importance of ensuring that the child or young person participates 'as fully as possible' in relevant decisions and is given the necessary support and information to enable this to happen.

In Scotland, the existing legislation was similarly considered to have shortcomings in relation to realising parental empowerment, such as with regard to information and participation (HMIe 2007). But it was also recognised that insufficient regard was paid to young people's rights. The Additional Support for Learning (Scotland) Act 2009 enabled a young person to request at any time an assessment or examination (including an educational, psychological or medical assessment/examination) and required the request to be granted unless unreasonable. Also, the Scottish Government was placed under a duty to ensure the availability to parents and young people of an advocacy service, on request and free of charge, for tribunal appeals. A subsequent initiative launched in 2014 called *Getting it Right for Every Child* ('GIRFEC') has aimed to improve children's wellbeing and prospects and to advance their right to be listened to and be assured that their wishes have been taken into account, consistently with the CRC. Significantly, s. 1 of the Children and Young People (Scotland) Act 2014 requires the Scottish Government to keep under consideration and implement any steps to give better or further effect to the implementation of the CRC and in doing so to take account, as appropriate, of 'any relevant views of children of which they are aware'. It also imposes a duty to promote public awareness and understanding of children's rights. These developments have built on the rights framework set out in the Standards in Scotland's

Schools Etc Act 2000 which specifically provides for a child's 'right to be provided with school education' (s.1), requires the child's views to be given due regard by the local authority when fulfilling its duty to provide the education supporting the development of the child's mental and physical activities and his or her personality and talents, and makes provision for various consultations with children about certain strategic matters (ss. 2, 5 and 6). So it is against that background that the 2016 Act has introduced new rights for older children – 12–15-year-olds – outlined below.

Table 1 shows the new rights accorded to children and young people as a result of the Children and Families Act 2014 (supplemented by the SEND Regulations 2014 (SI 2014/1530) and the SEN (Personal Budgets) Regulations 2014 (SI 2014/1652)) and the Education (Scotland) Act 2016.

[Table 1 near here.]

As the summary in Table 1 shows, there are important similarities between the two bodies of rights. For example, in both nations children and young people are given the right to information, advice and support, to have their voice heard in decisions on assessment and support and to be involved in resolving disagreements. On the face of it, the Scottish legislation appears more progressive than its English counterpart, giving children with ASN aged 12–15 who are deemed to have capacity effectively the same rights as parents and young people. For example, children in Scotland have the right to request a particular type of assessment, to request a statutory support plan and to make a reference to the First-tier Tribunal. In England, equivalent rights are accorded only to young people and the rights held by children are more limited.

In Scotland the new rights are limited by caveats associated with assessments of capacity and wellbeing (see below), although in England, there is also a threshold of capacity, with the SEND Regulations (above) providing for the rights of young people to be exercised on their behalf where they lack capacity as determined by the Mental Capacity Act 2005.[4] In Scotland, each time a child with ASN wishes to exercise a right under the 2016 legislation, they must first inform the local authority, which then informs the parents of the child's intention. Under the 2004 Act, as amended by the 2016 Act, the local authority must assess whether the child has capacity to 'do the thing' he or she wants to do, i.e. exercise the right (an extremely imprecise test) and whether accessing the right might have an adverse impact on the child's wellbeing. The requirement that the child must also specifically first notify the local authority of their intention to exercise the right clearly presents him/her with a bureaucratic burden. The tests of capacity and wellbeing in Scotland[5] were described by the Scottish Commissioner for Children and Young People as paternalistic, restrictive and at variance with the fundamental principles of the CRC (Riddell 2018). One of our key informants (see further 'Research methods' below), from the Equality and Human Rights Commission, suggested:

> The … Government are saying that the Act is giving children the right to challenge decisions and actions under the additional support needs framework. But I don't think they're actually giving children that right. What they're doing is saying, 'the education authority whose decision you're challenging will decide whether you've got capacity and whether it's good for you to exercise that right.' I think that's quite fundamental. (EHRC respondent)

In both nations, services have been instituted to help children and young people realise their rights. In England, information, advice and support is provided on a local basis to

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[4] The test being whether the individual is incapable of making a decision for him/herself due to an 'an impairment of, or a disturbance in the functioning of, the mind or brain': Mental Capacity Act 2005, s. 2(1). See Harris 2020, pp. 365–366.

[5] Guidance for testing capacity and considering wellbeing is available from http://www.gov.scot/Resource/0052/00529415.pdf

children and young people with SEND and their parents by SENDIASS.[6] The *Special Educational Needs Code of Practice 0–25* (DfE and Department of Health 2015) recognises that free accurate and impartial information is necessary to support partnership working with children and young people with SEND and their parents, and requires local authorities and Clinical Commissioning Groups to jointly commission high quality services which are meant to be independent of the local authority. However, questions were raised about whether the predecessors of SENDIASS, Parent Partnership Services, were truly independent and there were concerns that they might be a means of co-opting dissatisfied parents (Todd 2003).

Compared with SENDIASS, advice, information and advocacy support services in Scotland are more fragmented. In 2017, the Children's Service, known as *My Rights My Say*, was given Scottish Government funding to support children with ASN aged 12–15. Three different organisations are involved in service delivery: Reach, which is part of Enquire, the national advice and information service; Partners in Advocacy; and Cairn Legal. Somewhat confusingly, services for parents and young people aged 16–18 are available through different routes, with Enquire providing advice and information and Let's Talk ASN, a collaboration between the Govan Law Centre and Barnardos, providing advocacy and legal support (but only for parents and young people who are seeking to use a formal dispute resolution mechanism). Parents and young people who are not in dispute with the local authority do not have access to advocacy services, since Enquire's contract with the Scottish Government specifies that it must only provide advice and information, rather than undertake advocacy casework. All of these publicly funded services operate at a national level, whereas local authorities have a duty to commission independent mediation services. Additionally, local

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[6] Special Educational Needs and Disability Information, Advice and Support Service. Quality standards specified by the DfE for SENDIASS are available from https://councilfordisabledchildren.org.uk/sites/default/files/uploads/resources/IASS%20Quality%20standards%20FINAL.pdf

authorities in Scotland must (s. 26 of the 2004 Act) publish information on a range of matters including their policy and ASN arrangements, details of mediation services, officer(s) from whom parents of children and young people may seek advice and details of other prescribed persons or bodies from which advice or information can be obtained (Enquire, the Scottish Independent Advocacy Alliance and Govan Law Centre Trust).[7] Unlike in England, Scottish local authorities are not obliged to publish information about and evaluate the 'local offer' (referred to in Table 1).

Overall, compared with Scotland, the legislation in England places greater responsibility on local authorities to provide accessible information and support for children and young people with SEN and their parents. Support services in Scotland are delivered at national rather than local level, and although local authorities have a legal responsibility to inform parents, young people and children about these services, most do not do so. There is a particular lack of support for parents and young people aged 16–18, who are only able to use the national advocacy service if they are using formal dispute resolution services or are contemplating doing so. In both England and Scotland, much support comes from voluntary organisations rather than government-funded services, but there is a strong element of chance in finding the right support at the right time, as discussed below.

To summarise, the English and Scottish legislative frameworks reflect a clear commitment to ensuring that children and young people have an autonomous voice in special needs decision-making. However, we found a somewhat mixed picture of the effective implementation of the new children and young people's rights. Our local authority survey in both jurisdictions (Carmichael and Riddell 2018, Harris and Davidge 2018) showed that although the majority had provided some staff training on the new provisions on engagement

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[7] Prescribed by the Additional Support for Learning (Sources of Information) (Scotland) Order 2016 (SSI 2016/299).

and co-production, a significant minority had not. Most Scottish local authority websites failed to provide discrete areas for children and young people and while the position in England was different in this regard, there was considerable variation in accessibility and publication in a child-friendly format. Key informant interviews in both jurisdictions (Riddell 2018, Harris and Davidge 2018) showed that many professionals felt more comfortable operating within discourses of needs rather than rights, defending their right to make decisions on resource allocation. The case studies reported below indicate areas where progress has nevertheless been made in the involvement of children and young people, but also those where further progress is needed.

Research Methods

Our research adopted a mixed methods approach, using a variety of quantitative and qualitative methods. In order to obtain a broad overview of perceptions of recent legislative changes in SEN/ASN and their impact, an online survey was used with all local authorities in England and Scotland (152 in England and 32 in Scotland). In England, 56 responded (a 37% response rate) and in Scotland 18 responded (a 56% response rate). This broad overview was supplemented with 42 key informant interviews in Scotland and England (21 in each jurisdiction). Interviewees were from a range of professional backgrounds with experience in the field of SEN/ASN, including central government officers, teachers, educational psychologists, local authority managers, school governors, tribunal judiciary, ombudsman, lawyers, voluntary sector representatives and parents.

Subsequently, 36 in-depth case studies of children and young people with SEN/ASN were conducted using a nested case study approach (Chong and Graham 2013), in which children's lives were located within specific families, schools, local authorities and national jurisdictions. The aim was to discover the way in which policy on children's rights was understood at each level and in the context of a particular set of social circumstances.

Methods included semi-structured interviews, classroom observations and activities with children and young people and significant adults (parent/carers, education and social care professionals). Interview schedules and other research activities focused on ascertaining the extent of children and young people’s involvement in decisions on matters such as: pedagogy, curriculum and planning; school councils; the ‘local offer’; school choice: and the resolution of disagreements,. Our thematic data analysis contrasted the views of children and young people with those of adults, as well as examining how children and young people’s rights shape, and are shaped by, educational environments.

We selected and secured the co-operation of three English and three Scottish local authorities which were broadly representative of different areas socio-economically and geographically. There was some variation, albeit relatively small, in the proportions of school populations with ASN/SEN (including children with a CSP or EHCP). In each of the six authorities we conducted six case studies of children and young people with SEN/ASN in different family/care and school contexts (36 in total).

We aimed to focus on those whose primary needs fall within one of the most common overall official categories of SEN/ASN (Riddell et al., 2016): (1) social, emotional and behavioural difficulties (Scotland) and social, emotional and mental health difficulties (England); (2) moderate learning difficulties; (3) speech, language and communication difficulties; and (4) autistic spectrum disorder (ASD), although many children had multiple and overlapping difficulties. In each authority, we aimed to include both primary and secondary aged children as well as post-16s. In the event, in England our sample included slightly more younger children (half were of primary school age) and those in the 18–25 age group (one third of the case studies) compared with the Scottish sample, a majority of whom were aged 12–15. In addition to these variables, children and young people were drawn from different deprivation quintiles,[8] although those from more affluent areas were slightly over-represented. Cases were drawn from different types of school (local authority maintained mainstream and special; academies (England only); other special schools). Approximately one-third of the case study children and young people were female (broadly in line with the national gender imbalance among those with ASN/SEN) and most (all in Scotland) were of White British background.

Findings from English and Scottish Case Studies

Areas Where Children's Rights are Supported

School Pedagogy and Ethos

In both jurisdictions, children, parents and teachers generally believed that schools were positive environments in which children's voices were heard and respected. This commitment extended beyond the group of children with SEN/ASN, for example, many schools were participating in the UNICEF Rights Respecting Schools programme.[9] The idea of rights is abstract and could potentially be difficult for children to articulate, but the children nevertheless had a broad idea of them as entitlements to nurture and care, as illustrated by Lewis, at school in a socially disadvantaged urban area in Scotland:

> They should have the right tae play. Have the right tae eat. Have the right tae get sleep. Tae clean theirselves. (Lewis, 14 years, SIMD1, identified with SEBD, special unit attached to mainstream)

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[8] We used the Scottish Index of Multiple Deprivation (SIMD) and the English Index of Multiple Deprivation (IMD).

[9] Since 2006, 5,000 schools in the UK have participated in UNICEF's Rights Respecting Schools programme and are currently working towards embedding the principles of the UNCRC into daily school life as part of the accreditation process. https://www.unicef.org.uk/rights-respecting-schools/the-rrsa/awarded-schools/

Children often spoke positively about their teachers' efforts to make them feel included and listened to, as illustrated by Alan's positive comments about the Department for Additional Support, a special unit attached to a mainstream school in a socially advantaged Scottish neighbourhood:

> Very nice teachers who like genuinely care about you … about your wellbeing and they always ask about how you are, how your holiday's been. Just actually show an interest. It's very nice and it's a very inclusive school. (Alan, 17 years, SIMD 5, identified with ASD, special unit attached to mainstream school)

Teachers described how they tried to maximise opportunities for choice in learning:

> The pupils have an input into the topics they want to learn so it's balancing their choice along with the curriculum expectations of what … a broad general education should be. (Class teacher of Holly, SIMD 4, identified with ASD, special unit attached to mainstream)

Despite seeing many positive efforts towards realising children's rights, we also found occasions when children and parents felt marginalised and disrespected, even when teachers believed they were creating an enabling classroom environment. For example, Lyron, identified with autism, attended a special unit (known as a 'resourced provision') attached to a mainstream primary school in England. For two afternoons a week, he was supported by a teaching assistant to join his peers in the mainstream classroom and was also involved in education, health and care planning meetings. Nevertheless, Lyron was not allowed to join the other children at lunch and playtime, and felt isolated from his peers:

> I'm not allowed out for lunchtime … something happened in year four and I've not been out for lunchtime ever since that incident … I'm just really annoyed. It's not fair, because I've been doing this for eight months. (Lyron, ASD, 9 years old, resourced provision, England.)

Involvement in Formal Educational Planning

Scotland and England have adopted different approaches to educational planning. There is a more formal system south of the Border than north of it. In England, there has been an increase in the use of statutory support plans since the 2014 legislation, with just under 3% of children receiving EHCPs (Gillooly and Riddell 2019). By way of contrast, there has been a gradual decline in the use of CSPs in Scotland since the passage of the 2004 Act, now covering only 0.3% of the child population. As a result of the emphasis on formal planning in England, minuted meetings to review needs, monitor progress and plan future steps take place regularly and generally, to some degree, involve the child/young person, as well as parents. By way of contrast, in Scotland formal meetings are much less common and rarely involve the child. Among our case study children and young people, only two in Scotland had a CSP (and one of these might have lapsed), whereas in England, just over three-quarters (14 out of 18) had an EHCP.

In Scotland, most parents did not know what type of plan their child had, or indeed whether they had any plan at all. Parents told us about CSPs opened in primary school which were allowed to quietly lapse when a child entered secondary school. They also said it was extremely difficult to find information about statutory support plans. Scottish parents who insisted on such a plan were generally happy for their child to be involved, while recognising the child’s right to opt out of the process, as illustrated by David’s mother:

> I guess that, this comes down to the child’s capacity actually. Certainly at primary, whenever we had child planning meetings, David would complete the My Views sheet with the help of the Support for Learning teacher but he is not keen to be involved in meetings. … And whenever we have a meeting in school I always give him the option to come. And he’s quite adamant he doesn’t want to come, which is him executing his right, I suppose. (Mother of David, 13 years, SIMD5, identified with physical and learning disabilities, special unit attached to mainstream)

In England, by way of contrast, children and young people were more actively involved in formal aspects of support planning processes via their input to the ‘All about me’ section A of their EHCP[10] and attendance at EHCP review meetings. Unlike their Scottish counterparts, most parents knew that their child had an EHCP and the majority of children and young people were invited to participate in EHC planning. However, studies have indicated that their degree of involvement in planning tends to be sub-optimal, particularly in relation to section A (Adams *et al.* 2017, Palikara *et al.* 2018, RIP:Stars 2018). The extent to which children and young people participated in meetings was influenced by parental concerns about potential adverse effects, such as the negative impact of talking about the child/young person’s vulnerability or disability in their presence. Where children or young people attended all or part of an EHCP review meeting, they generally spoke about their current needs and future plans. Children and young people with complex needs or communication difficulties were helped to articulate their views via a short film, assistive technology or with the support of a familiar adult.

The extent of a pupil’s participation in decision-making was far from uniform or consistent across England and was affected by the degree of support for person-centred planning. For example, Peter (aged 16, identified with ASD) attended a mainstream secondary school and was always invited to EHCP meetings, where he was able to express his views freely. By way of contrast, Chloe (aged 8 and also identified with ASD), was described by her special school teacher as ‘talking non-stop’, leading to reservations about attendance at her forthcoming EHCP review to avoid having ‘a review that will last all afternoon.’

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[10] Section A of the EHCP is a dedicated space for the child and his or her parent/carer or the young person to include their views, interests and aspirations in their own words and forms an integral part of the EHC planning process.

Involvement in Collective Participation

In both jurisdictions, efforts were made to involve children and young people with SEND/ASN in collective forms of participation such as school/pupil councils, although they tended to be under-represented among participants (Whitty and Wisby 2007). Articulate and confident children were more likely to be involved than others and questions arise about the extent to which these councils and prefect systems are genuinely focussed on enhancing children's rights, or rather co-opting children into promoting the school's values and interests. Nonetheless, participants were generally positive about their experiences. Alan, for example, described his pride in participating in the Advanced Highers parents' evening:

> And so we'll come in, set up and we'll stand and help parents and all that. And we always seem to have a good reputation … with our blazers and badges and stuff like that. (Alan, 17 years, special unit attached to mainstream school, SIMD 5, identified with ASD)

However, some students were sceptical about the extent to which critical voices would be heard. For example, Laura, aged 17, felt that her college in England was receptive to hearing positive views but was not open to criticism:

> We fill in a form once a year that says, 'Do you feel happy at college?' And most people say, 'Yes.' And I wrote them a short essay about why I said, 'No.' And I was never asked any questions on it afterwards. (Laura, 17 years, FE college, IMD 3, identified with specific learning difficulties)

In England, some local authorities commission charities such as Barnardo's to run support groups for children and young people with SEND, including those who are care experienced. Jacob, aged 22, commented on appreciating the opportunity to learn about his rights and have his views heard:

> I like to feel valued and appreciated because I have no family. I like to feel that I belong somewhere. I like to be given time to devote to my committee. I like to feel that I have a

> voice and can make a difference. (Jacob, 22 years, English FE college, IMD 1, identified with social, emotional and behavioural difficulties/autistic spectrum disorder).

Areas Where Less Progress Has Been Made on Children's Rights

Children with Complex Needs

In line with other research (McNeilly *et al.* 2015), we found that teachers often felt that they lacked the skills to interpret the views of those with little or no speech. For example, in a Scottish special school for children with complex needs, a teacher explained the difficulties she perceived in giving children choices:

> You know, we're always looking at ways to give pupil voice, but a lot of it's on a level of [simple] choosing. So, you know, 'Do you want that for snack or do you want that for snack?' And then they can choose. (Scottish special school teacher – children with complex needs)

Conversations with two staff members ('SL' and 'PV') at one special school in England catering for children with complex needs revealed similar difficulties:

> SL: This is where the PFA [Preparing for Adulthood][11] is a very difficult document to work with when you're trying to say to students, 'What help do you need in the future?' … They're like 'what's the future?'
> PV: They can't understand the concept of tomorrow, let alone…
> SL: Well their future is, I want to stay here 'cause this is the here and now, this is all they know. The thought of leaving something and not knowing, that's really difficult.
> PV: That sets massive high anxiety levels for our students.

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[11] Under reg 18 of the SEND Regulations 2014 (SI 2014/1530), where a child or young person is within 12 months of a transfer between phases of education, the local authority must review and where necessary amend the EHCP by a prescribed date (31 March in the case of a transfer to post-16 education and 15 February in any other case). The SEN Code (DfE and Department of Health 2015, para. 8.9) provides that the EHCP review at year 9 and every year thereafter must include 'a focus on preparing for adulthood'.

(Pupil Voice Co-ordinator & Sixth Form Leader, English special school.)

Children Living in Areas of Deprivation

Across the social spectrum, parents participating in the case studies had very little knowledge and awareness of their and their children's rights under the current legislation. Those living in areas of social deprivation often appeared acquiescent to authority because of repeatedly being ignored. Living in a highly deprived Scottish neighbourhood, Colin's mother was concerned about the school's failure to recognise her son's anxieties, by labelling him as a 'work avoider'. Her attempts to phone the school were unsuccessful and, rather than lodging a formal complaint, she eventually gave up in despair. Likewise, south of the border, Ben's mother felt ill-informed about the EHCP process and tended to rely on professionals as, 'they know what they are doing'. She felt unable to challenge her son's speech and language therapy provision due to lack of confidence and a resignation borne out of feeling that school resources were already overstretched.

There was also a tendency to disregard the views of children and young people from socially disadvantaged backgrounds, particularly those lacking parental advocacy. For example, Chloe, a child in kinship care, objected to being moved from mainstream school into a special class with children who did not communicate verbally:

> I don't like the fact that I'm in a class with … two very autistic young people. And it gets a bit annoying. And I think I should be in a different class with the higher functioning people. (Chloe, 14 years, SIMD 1, special unit attached to mainstream, kinship care, identified with SEBD/ASD).

By way of contrast, middle class parents were more adept at engaging with the school to achieve the best outcome for their child. For example, in England, Peter's mother decided to involve herself in the school, despite limiting her employment opportunities:

> I got off to a good start with the primary school … I was chair of the PTA for eight years and became a really key part of the school so then I had access to SENCOs [special educational needs co-ordinators] just all the time … I'd be at a Christmas Fair and the SENCO would be working with me and I'd be like 'Oh blah, blah, blah.' I did that on purpose so that I could sort of understand the school better and, you know, the teachers saw me differently because I was giving a lot back to the school … (Mother of Peter, 16 years, IMD 4, identified with Autistic Spectrum Disorder)

As a middle class parent, Peter's mother was aware of the strategies which were likely to ensure that her voice was heard in educational decision-making. Parents from less advantaged backgrounds were generally less successful in ensuring that their voices were heard.

Involvement in School Choice and 'The Local Offer'

In general, parents in both jurisdictions believed that they were best able to determine what was in their child's best interests regarding school choice, although they recognised that the 'buy in' of the child or young person was necessary to make the placement work. In England, the CFA, 2014 (s. 38) includes provision for young people (or, in the case of a child, the parent) to request a particular school or other institution to be named and included within an EHCP. Within the English case studies, several young people referred to receiving support from parents and carers in school/college choice. For example, after visiting a number of colleges with his parents, Kei chose a Catholic college on the grounds that it had the best level of support and drama was included in the curriculum. His father described it as a joint decision:

> He did have a say and we did try to discuss and advise and that kind of thing, yes … we did try to come to the best decision as possible as a family and then also in discussions a bit with his teacher and stuff. (Father of Kei, 17 years, IMD 5, FE College, identified with moderate learning difficulties)

In both jurisdictions, however, choice of school for primary and younger secondary school children was heavily shaped by parents, with little child involvement.

There are a number of statutory duties placed upon English local authorities to produce, publicise and consult with young people and families regarding the area's 'local offer', including information about local SEND services. The CFA 2014 also requires local authorities to keep the local provision of education, training and social care for children and young people with SEND under review (s. 27) and to invite comments from users of the local offer and publish them (at least annually) along with details of any action taken by the authority in response to the views expressed.[12] In our survey of local authorities in England, a third of authorities did not always consult with children and young people. Local authorities which engaged with children and young people found the consultative process helpful in shaping future improvements in service delivery (Harris and Davidge 2018).

Dispute Resolution

In England, far greater use is made of formal dispute resolution mechanisms compared with Scotland (Gillooly and Riddell 2019), a pattern reflected in our case studies. In the Scottish case studies, only two parents had made placing requests and one had used mediation. By way of contrast, in England half of the case study families had been involved at some point in claims regarding exclusion, placement at a preferred setting or the level of special needs support. Despite these differences, children and young people were rarely involved in the formal processes, although their views were relayed to the panel. In Scotland, under the 2016 legislation, children aged 12–15 are allowed to request adjudication or make a reference to the

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[12] See further SEND Regulations, 2014 (SI 2014/1530), Part 4, which sets out the LA's statutory duties regarding the local offer.

tribunal, but are not allowed to request mediation; however, nationally (at the time of writing) only two references to the tribunal since 2017 have involved a child as the party. School staff in Scotland were generally unaware of the fact that children could mount a legal challenge and a Scottish head teacher reported his ‘bewilderment’ on hearing about children’s right to be the principal party in a tribunal reference, indicating that he and his colleagues had received no prior warning of the legislative changes from the local authority or the Scottish Government.

Doubts were also expressed about the capacity of children with ASN to engage in legal processes, and there were fears that the new rights might be abused:

> Carl for example … has autism and he’s quite literal about many things and he will not take jokes the way we take them which is fair enough. So many times in the past he has accused staff of mistreating him in his old school and so on which might be fair to an extent, I don’t know, I cannot tell. However, I can see if it’s not true and if Carl would be able to take that to court, I think it would be a very big case and an unjust case in a way. (Learning support teacher)

In England, three dispute resolution mechanisms are identified in the CFA 2014. The first arises from a local authority duty to establish arrangements for independent persons to facilitate ‘resolution of disagreements’ between young people or parents of children and local authorities or other relevant bodies (s. 57). These services, however, appear to be little utilised. Secondly, there is provision for mediation of disputes involving these parties about most of the key issues concerning a child’s SEND and provision, including health care provision (ss. 53 and 54). Thirdly, there is a right of appeal to the First-tier Tribunal over a wide range of SEND decisions, including a refusal to carry out an assessment, a decision about making an EHCP and the determination of the contents of an ECHP (s. 51). However, a precondition of bringing an appeal is receipt of information from a mediation adviser about mediation and the issuing of a certificate by the adviser confirming either that the intending appellant has participated in mediation or decided not to participate in it (s. 55). The tribunal also has jurisdiction under the Equality Act 2010 to hear complaints of disability discrimination brought by a young person (very few cases have been brought by them) or child's parent, complaints which may be heard in conjunction with an SEN appeal, if also brought.

Within the English case studies, several children or young people explained that they had alerted a parent or carer to their unhappiness concerning their educational setting and that the parent or carer had either independently secured a placement at an alternative setting or instigated an appeal. No young people had experience of engaging with mediation services or realising their right to appeal to First-tier Tribunal independently and in all cases involving appeals, it was parents and carers who had acted. Research by Cullen *et al.* (2017) for the DfE indicated that young people's experiences of the processes of mediation and appeal in England were anyway 'largely negative'. In the majority of dispute cases, the parent or carer tried to protect their child from undue distress by limiting their involvement in any conflict (a finding consistent with other studies: see e.g. Drummond 2016 and see generally Walsh 2017). For example, Aiden's parents were involved in a number of appeals and Aiden explained that he had only recently become aware that his mother had been 'battling for years to get me to come here'. He said that he was glad not to have been involved but appreciated his mother's efforts on his behalf, recognising that she would 'never give up'.

Another case in England, involving Lizzie (21 years, identified with moderate learning difficulties/ASD), highlighted some tensions around the extent to which parents and carers support their child (or in this case, a vulnerable young person) to participate in appeals whilst at the same time wanting to limit their exposure to conflict. In 2016, Lizzie and her family were involved in a First-tier Tribunal case which eventually resulted in her securing a place at her preferred college. Lizzie's parents had tried to support her to express her views and wishes and maximise her participation in the appeal. Various sources of independent advocacy support had been helpful. Lizzie's mother explained that her daughter had been indirectly involved in the decision to appeal, but Lizzie's participation was limited by several factors:

> [W]e asked her which college she'd prefer, we kept her informed of the process but she wouldn't have known how to appeal, so we sought information from friends, Barnardo's, Parent Partnership, National Autistic Society, Northern College, NATSPEC,[13] solicitors and online parents etc. We had tons to learn in a short time, the process would have been too difficult for Lizzie and she hates conflict. She would have also found it difficult to fund, I think she would have been eligible for legal aid, but again I don't think she could have applied without support … We asked her if she was happy for us to appeal on her behalf, which she was.

The majority of parents considered, on the basis of their own experience, that their child would have great difficulty in realising their right of appeal independently because of what such participation involved. Education professionals tended to offer a more optimistic view and demonstrated a commitment, at least in principle, to support a young person's participation preferences.

Conclusion

Overall, there appear to be more similarities than differences between England and Scotland in efforts to promote the rights of children and young people with SEN/ASN in schools and classrooms. In both jurisdictions, similar issues arise in involving children with more significant difficulties, those from socially disadvantaged backgrounds and those who are looked after/care experienced. Regarding progress on enhancing the rights of children, in both

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[13] A 'membership association for organisations which offer specialist further education and training for students with learning difficulties and/or disabilities.' Available from: https://natspec.org.uk/about-us/who-we-are/natspec/ [Accessed 22 April 2020].

nations there is evidence of success in creating inclusive classroom environments where children's voices are routinely listened to concerning everyday classroom matters. However, our case studies suggest that much work is still needed to include fully and support children and young people to participate at a meaningful level in formal decision making contexts, including dispute resolution and school choice. This chimes with Tisdall's perceptions that practitioners are much more comfortable with the well-being rather than the rights agenda, since the latter involves ceding elements of control to children and young people (Tisdall 2015a, 2015b).

We have identified something of a paradox, in that stronger children's rights legislation in Scotland has not obviously led to a greater degree of empowerment for children and young people in schools. In England, a more tightly regulated planning system has enhanced the involvement of children and young people in formal processes. Scotland, by way of contrast, has adopted a laissez-faire approach to the use of formal statutory support plans. The over-complex and opaque system north of the border allows local authorities to pursue an idiosyncratic approach, resulting in a proliferation of poorly understood plans lacking statutory power. As a result, in Scotland, CSPs have become almost obsolete, only accessible to the most determined and best informed parents. By way of contrast, England's growing use of EHCPs and an increased level of demand for local authority assessments means that children and young people are much more likely to be involved in formal planning processes and in dispute resolution when things go wrong. It may, in many cases, be the type of tokenistic involvement which, as noted by Lundy (2018), has often been dismissed by children's rights advocates as fairly worthless. Yet, as Lundy argues, 'tokenism is sometimes a start', and not listening to children's voices is always wrong – 'a breach of their human rights'. Much of the literature highlights problems and inadequacies in current attempts to facilitate children's participation, yet there is a need for adults to engage seriously with views expressed by children. Lundy suggests that whenever attempts are made to seek children's views, this should be followed up by feedback which is child-friendly, fast and explains how the views expressed will be translated into action. Efforts to capture children's voices which at first appear to be tokenistic may subsequently result in incremental social change. This applies to all children equally, thus fully including those with SEN or ASN.

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Tables

Table 1: New rights accorded to children and young people with SEN in England (Children and Families Act 2014) and children aged 12-15 with ASN in Scotland (Education (Scotland) Act 2016)

ENGLAND	SCOTLAND
Right to request that the local authority –	
Carries out an assessment or a reassessment of their needs (young person only)	Identifies whether they have ASN
Names a specific school as the placement in the EHCP (young person only)	Specifically assesses their needs
Prepares a personal budget (for expenditure on provision) if there is an EHCP (young person only)	Sees if they need a CSP
	Reviews the need for an existing CSP (unless the request is 'unreasonable')
Right to have their views heard and given regard to –	
Local authority must have regard to children and young people's views, wishes and feelings and the importance of their participation	In connection with the support to be given by the local authority to meet their needs
First-tier Tribunal must have regard to the child or young person's views, wishes and feelings	With help and advocacy to facilitate it ('My Rights My Say')
Children and young people must be consulted by the local authority over the published 'local offer' (provision available in their area)	
When the local authority carries out an assessment of the young person's needs	
Content of draft or actual EHCP for young person	
Rights of access to information and advice –	
On SEND, for the child or young person	About their ASN
For the young person, information on right to give their views on an assessment	If there is a CSP, there is a right to receive a copy of it
Young person's right to a copy of the finalised EHCP and for the EHCP's non-disclosure without consent	Right to be told of decisions concerned with their ASN rights
Young person's right to provision of information on right of appeal and other redress	Duty of local authority to publish and provide to children aged 12–15 information about prescribed matters including mediation services and the authority's dispute resolution processes.
Right to be involved in disagreement and dispute resolution processes –	
Young person can opt for and take part in a mediation and in an appeal to the First-tier Tribunal	Can request 'independent adjudication' (a little used process)

A child can attend a mediation with parent’s and mediator’s consent	Can make a reference to (i.e. appeal to) the First-tier Tribunal (but no right to request mediation).
Child or young person can attend appeal hearing	Can be asked for their views during a mediation
Young person can access disagreement resolution services arranged by local authority	